Supreme Court of the United States

OCTOBER TERM, 1944

No.

ROBERT L. EMERY, ET ALS.

versus

ORLEANS LEVEE BOARD

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI AND REVIEW TO THE SUPREME COURT OF LOUISIANA.

May it please the Court:

The point involved in this case is whether or not property of the petitioners can be taken from them because it lies within an area over which the defendant was legislatively authorized to establish a spill-way, the act authorizing the construction of the spill-way expressly providing that all property privately owned

within the selected area should first be acquired by purchase, donation or expropriation when it is established that no acquisition whatever has been made of the property by the defendant.

The record establishes that the petitioner's title to the property involved is full and complete, running back to the Government. It shows that the property was adjudicated to the State for the non-payment of taxes for the year 1921 in which year it was improperly assessed as a whole to a party who had acquired an interest therein from one of the heirs of a co-owner.

It shows that the property owned by the petitioners was redeemed from the effect of the tax adjudication under the provisions of Louisiana Act 47 of 1938 and thereby the title and the ownership thereof was fully restored to them the same as if no tax adjudication had been made of their property.

In considering the question, it must first be shown what, under Louisiana Law, is the effect of the redemption from a tax adjudication and to that end we quote decisions from the Highest Courts of the State of Louisiana upon that point.

(1) "Grants of land by the State to Levee Boards were not grants 'in praesenti', but title and possession remained in the State and under control of Legislature, which has authority to withdraw such grants until conditions required by statute to the Levee Board have been met. Act No. 74 of 1892, as amended by Act No. 160 of 1900".

Standard Oil Co. vs. Allwin, 196 La. 824.

(2 "Where property adjudicated to the State for nonpayment of taxes is redeemed from the State under the provisions of Act 47 of 1938, the tax debtor is restored to the full ownership of the property. Nor can a Levee Board, where the property is located, acquire any right thereto under Act 324 of 1938, which act to the extent of permitting transfers to the Levee Board is unconstitutional, Act 237 of 1924 having repealed the right of a Levee Board to acquire property adjudicated to the State for nonpayment of taxes. ***Fitzpatrick vs. Grace,*** 187 La. 1028, affirmed, ***Airy vs. Tugwell,*** 197 La. 982.

(3) "A statute permitting redemption of property which has been adjudicated to the State or any of its political subdivisions as long as title thereto is in the State or any of its subdivisions, by its reference to title being in the States or any of its subdivisions, means the State or the political subdivision to which lands have been adjudicated for non-payment of taxes. Act No. 14 of 1935, 4th Ex. Sess.—***State ex rel. Hodge v. Grace,*** 184 So. 527, 191 La. 15.

(4) "A statute permitting redemption of property which has been adjudicated to the State for unpaid taxes as long as title thereto is in the State or any of its political subdivisions grants a right of redemption in such cases where the title of the State, though the property may have been transferred, has not been absolutely vested in the subdivision. Act No. 170 of 1898, Par. 62 as amended.—***State ex rel Hodge vs. Grace.*** 184 So. 527, 191 La. 15

(5) "Both Act 161 of 1934 and the extending Act 14, 4th Ex. Sess. 1935, have been held constitutional. ***Police Jury of Jefferson Davis Parish***

v. Grace, Register, et al., 182 La. 405, 162 So. 26. ***Violet Trapping Co. v. Grace, Register,*** 297, U. S. 119,56 S. Ct. 386,80 La. Ed. 518". ***Brook vs. Lamarca,*** 1 Southern Reporter, 2nd Series, Page 436.

(6) "In ***Cambon vs. Lapine,*** 40A527, the Supreme Court of La. held, referring to a tax adjudication "when redeemed the property ***reverts*** to the original owner".

(7) "In ***Blocker vs. Continental Securities Corporation,*** 157 Sou. 155 the La. Second Circuit Court of Appeals, Mills, Judge, held: "where property is sold for taxes and redeemed, title reverts to the original owner".

(8) "In ***Housing Authority vs. Breen,*** 10 Sou. (2nd) 395, the La. Second Circuit Court of Appeals, Telafaro, Judge, says: "a redemption of a tax sale of realty does not create a new title, but simply effaces the tax sale and restores title to the status prior to such tax sale".

(9) "And in ***Johnson vs. Chapman,*** 190 La. 1034, the Supreme Court of La. held: "The redemption by the grantee of the tax debtor of the property which has been adjudicated to the State for delinquent taxes restored an indefensible title to grantee as of date of tax sale."

Perhaps the clearest expression of the Courts of Louisiana on this point is found in the opinion of Judge Hamiter, now of the Supreme Court of Louisiana, who in ***Dyer versus Wilson,*** 190 So. Reporter 851, La. Second Circuit of Appeals says:

(10) "In a tax sale the sovereign is never vested with title to the involved property and cannot and does not itself grant one but possesses only

a lien and privilege on the property to secure payment of delinquent taxes and in the enforcement of that security can, pursuant to legislative authority, cause the sale and the purchaser acquires such title to and rights in the property that the tax debtor has subject to all encumbrances affecting it except conventional or judicial property".

Having now shown that under Louisiana Law, the redemption from a tax adjudication restores the property to the owners as if no tax adjudication had been made, we must now consider what effect the passage of Louisiana Act 99 of 1924 had on the property of the petitioners.

That act required that before the defendant could establish the spill-way, which it was therein authorized to create, it should first acquire by purchase donation or expropriation all private property within the selected area.

While the property of the petitioners was within the selected area no attempt whatever was made by the defendant to acquire ownership of their property. The record shows that it knew to whom the property belonged but because it had been adjudicated to the State for taxes, it considered it might appropriate the property without payment or expropriation.

The Constitution of the State of Louisiana provides in Art. 10, Sec. 7 that there can be no forfeiture of property for the non-payment of taxes and its laws provide (Act 161 of 1934) that as long as property adjudicated to the State has not been disposed of by the State under existing laws that it can be redeemed from

the tax adjudication by the owner, and the authorities above quoted show that when so redeemed it comes back into the hands of the owners as if no tax adjudication had been made.

One theory of the defendant was that because the property at the time of appropriation was in the State that the State by enacting Act 99 of 1924 donated all property so adjudicated to the defendant, but the Constitution of the State of Louisiana provides that property adjudicated to the State for taxes is not forfeited to the State but remains the property of the tax debtor subject to the right of the State to dispose of it under existing laws and that Constitution likewise provides that the property of the State cannot be donated to any public corporation. (Art. 4, sec. 12, La. Constitution of 1921).

It is hence pertinent to inquire if La. Act 99 of 1924 permitting the construction of the spill-way made any provision as to lands within the area which had been adjudicated to the State for taxes or which were owned by the State and that act makes no mention whatever of such lands, but only provides a specific means of acquiring all lands within the selected area. The title of the act says only "to acquire by expropriation," while the body of the act (Sec. 3) says "to acquire by purchase or expropriation".

It is hence pertinent to inquire if La. act 47 of 1938 made any exception or provision therein as to what land which would be affected by that act.

An examination of that act shows that it is general

in character and makes no exemption whatever as to those who should have the right to redeem from the tax adjudication, and is all inclusive of all lands adjudicated to the State.

It being hence shown that the defendant had no right to appropriate the petitioner's property under La. Act 99 of 1924 or under La. Act 47 of 1938 and the defendant having no title whatever to their property, it is then pertinent to inquire under what theory the defendant can claim to own that which it did not acquire and thus deprive the petitioners of their property.

This was the question which Chief Justice O'Neill of the Supreme Court of Louisiana and Justice Janvier of the Orleans Court of Appeal, in their respective dissenting opinions, as well as the trial Judge, found it was impossible to answer in favor of the defendant.

However, the Supreme Court of the State of Louisiana, and the Orleans Court of Appeal, found an easy way to solve the difficulty. They concluded that, if La. Act 99 of 1924 and La. Act 47 of 1938, were somewhat broadened that the trouble would be at an end and they, by construction or interpretation, added words, which were not in these acts and thereby cut the Gordian Knot. They assumed what, in their judment, the legislature intended to say, but did not say, and this Court is asked by the petitioner to say whether or not Courts can judicially legislate through interpretation, or can it be said that there was an implied dedication of private lands when there was no law to authorize such a statement.

Can a Court substitute its judgment of the ***intention*** of the Legislature in enacting a statute as against the ***intention*** of the Legislature as expressed in the Act itself.

To do this would avoid the whole theory of our Government for the Judiciary branch of our Government is one thing and the Legislative Branch is another and neither must trench on the powers of the other.

That the Courts of Louisiana do follow this well established system or rule is shown in recent decisions of the Courts of that State.

Besides the Civil Code of Louisiana in article 13 expressly provides:

> "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit".

And in passing on this article of the Code, the State Supreme Court of Louisiana in ***Gurley versus City of New Orleans,*** 41st an. 75 on page 90, says:

> "To sanction such a proceeding by the city, would be to recognize in her the power, at her caprice, to abrogate and set at nought the will of her creator, the Law Giver, and to substitute her own, in its stead, regardless of the damage or injury occasioned thereby".

The principle set forth in the cited article of the Code is supported by a long line of decisions of the Supreme Court of Louisiana.

And the Court of Appeal in ***Levy vs. R. R. Co.***, 20 Sout. (2nd), Re. at page 559 says:

> "The function of courts, in construing statutes and ordinances, is to interpret legislative will, and not to supplement it or to supply it".

And at page 562 of that report, quoting from a Texas case, the Court says:

> "When courts, in construing statutes, depart from the language employed by the legislator, they incur the risk of mistaking the legislative will, or declaring it to exist where, in truth, it never had an expression. The legitimate function of courts is to interpret the legislative will, not to supplement it, or to supply it".

The Supreme Court of Louisiana in its opinion in this case says:

> "From our appreciation of Act 99 of 1924, the Legislature ***intended*** for the land embraced in the spillway to be set aside and removed from commerce". (Our emphasis).

While that Court might consider that it was the intention to say that the lands adjudicated to the State should be transferred to the defendant or be considered as impliedly made public lands, yet the act says nothing of the sort and as previously shown, under the Constitution of the State of Louisiana, the Legislature could not do so and if the Legislature could not do so, it is certain that a Court, interpreting a statute, could not by interpretation create that which was not in the act which it was called upon to interpret.

In the opinion of the Supreme Court of Louisiana, it is stated:

> "The act provides for the acquisition of the fee title of the lands embraced in the spillway and for such title to be reposed in the Orleans Levee Board. While the act does not specifically state that the lands belonging to the State are to be dedicated, yet provision is made for the acquisition of all lands in that area belonging to State agencies or private persons".

The provision that the Court refers to is section 3 of Act 99 of 1924, but there is not one word in that section, on anywhere in the act, which says, as that Court says, "For the acquisition of all lands in that area ***belonging to State Agencies***".

This was a clear misquotation of the act in question and by that misquotation it is sought to deprive petitioners of their property in violation of their Constitutional rights.

With this misquotation and interpretation of Act 99 of 1924, that Court then concludes that it was the intention of the Louisiana Legislature that all lands embraced in the area was to be set aside for the spillway and removed from commerce, but the act says that all lands in the area should be first acquired by purchase or expropriation.

Heretofore we have shown that under the Constitution of the State of Louisiana a tax adjudication did not vest a complete title in the State; it only had an inchoate title to such adjudicated lands in order to

secure to the State what was due it, hence the repeated statement that the property belonged to the State is shown to be erroneously ***and it was upon this erroneous theory that the petitioners were deprived of their property without due process of law, in violation of their Constitutional rights.***

The Supreme Court of Louisiana supports its opinion by citing the cases of the City of Cincanniti versus White, but that opinion states that "All that is required is the ***assent*** of the owners of the lands" but here there was no assent whatever; nor, ever did they have their day in court. As soon as they could dissent, they did so by filing suit to recover their property, which the defendant had wrongfully appropriated to itself.

The opinion of the Supreme Court of Louisiana is bottomed on the theory that because a public spillway has been created, that this fact bars all private rights, but the act under which the spillway was created provided that before it could be created all land in the area should be acquired by purchase or expropriation, which provisions of the law under which the defendant acted, it saw fit to ignore finding it easier to appropriate instead of expropriating.

The Supreme Court of Louisiana says that section 12 of article 4 of the Constitution of Louisiana, heretofore and herein discussed, does not apply, but it gives no reason why it does not apply, except that the land was set aside by act 99 of 1924 for a public purpose, but that act limits the right of establishing such public work by requiring that the land required for the pro-

posed public purpose should be first acquired in a lawful manner which was not done.

Nor was the property of the petitioners ever public property or property belonging to the State.

As the 14th Amendment of the Constitution of the United States provides that no one should be deprived of his property without due process of law, the cause of the petitioners falls squarely under that provision.

Here, without notice, without a hearing, and without compensation the petitioners have been deprived of the ownership of their property for public purposes, and the Supreme Court of Louisiana says that this wanton appropriation by the defendant must stand because that Court had added words, interpretations and misconstructions of statutes of Louisiana which, if taken as enacted, afforded petitioners adequate relief.

Federal Statutes Annotated, Volume 9, page 423, says:

> "The essentials of due process of law should be distinguished from matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the law-making power of the state, and as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the

> one, due process of law is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states."

And this Court, in the case of ***Scott v. McNeal,*** 154 U. S. 45, said:

> "Upon reviewing, by writ of error, a judgment of the highest court of a state, the Supreme Court of the United States is not bound by that court's construction of a statute of such state when the question is whether the statute provides for the notice required to constitute due process of law."

In Louisiana Act 99 of 1924, here under discussion, it is provided that all lands not donated within the area affected thereby, should be acquired by purchase or expropriation. Here there was no such acquisition had, while other lands in the area were acquired by purchase or expropriation; hence, there was discrimination against the petitioners.

The defendant says that because the land of the Petitioner had been adjudicated to the State, that the condition as to this land was different from the other lands in the area, but the Act says ". . . ***all lands*** in the area should be legally acquired."

Herein, we have shown that the land affected was not State land, the State having only an inchoate title or interest therein, while the petitioners had a full title thereto, so, without notice, purchase or expropriation, the defendant seeks to appropriate their property, which it is claimed is a deprivation thereof, in violation

of the provisions contained in the Fourteenth Amendment of the Constitution of the United States, and thereby they have been deprived of their property without due process of law.

Long ago this question of due process came before this Court, in a casee from Louisiana, wherein this Court held:

> "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing powerof assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law." ***Davidson v. New Orleans,*** (1877) 96 U. S. 107.

Federal Statutes Annotated, Volume 9, page 426, says:

> "By 'due process of law' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adopted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In sum, the petitioners are full title owners of the property claimed of which the defendant has no title, but which it has appropriated without payment or title and seeks now to divest them of their property in violation of the provisions of the Constitution of the United States.

It is urged that the writ of Certiorari and Review should be ordered to issue in this cause.

Respectfully submitted,

W. H. TALBOT,
Attorney of Petitioners.

F. RIVERS RICHARDSON,
Of Counsel.